

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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JAN 13 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Redevelopment of Spectrum to  
Encourage Innovation in the  
Use of New Telecommunications  
Technologies

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DOCKET FILE COPY ORIGINAL

ET Docket No. 92-9

To: The Commission

**PARTIAL WITHDRAWAL OF PETITION  
FOR CLARIFICATION OR RECONSIDERATION**

On November 30, 1992, Apple Computer, Inc. ("Apple") filed a Petition for Clarification or Reconsideration ("Petition") in the above-captioned proceeding. The Petition requested clarification and reconsideration of certain elements of the Commission's First Report and Order and Third Notice of Proposed Rulemaking in the proceeding. The Commission, however, has released an Erratum that already clarifies the matters as to which Apple had sought clarification. Apple, therefore, is withdrawing that portion of its Petition. A revised Petition, which is confined to the non-clarification aspects of Apple's initial filing, is attached hereto.<sup>1</sup>

Respectfully submitted,

APPLE COMPUTER, INC.

By: /s/ Henry Goldberg

Henry Goldberg  
Joseph A. Godles

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Its Attorneys

January 13, 1993

<sup>1</sup>Since Apple simply is withdrawing a portion of its Petition, and is leaving unchanged the substance of the balance of its Petition, no leave appears necessary for this filing. Out of an abundance of caution, however, Apple respectfully requests such leave to the extent it is required.

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Technologies )

To: The Commission

**PETITION FOR RECONSIDERATION OF APPLE COMPUTER, INC.**

Apple Computer, Inc. ("Apple"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petitions for reconsideration of the Commission's First Report and Order and Third Notice of Proposed Rulemaking (the "FCC Decision" or "Decision") in the above-captioned proceeding.<sup>1</sup> As discussed below, the Commission should hold in abeyance the transition rules that were adopted in the FCC Decision pending resolution of the transition issues as to which the FCC Decision solicited comments.

The FCC Decision consisted of both a First Report and Order and a Third Notice of Proposed Rulemaking. The First Report and Order made spectrum available in the 2 GHz band for emerging technologies. The Third Notice of Proposed Rulemaking reached at least tentative conclusions concerning various elements of a transition plan for reaccommodating existing 2 GHz fixed microwave operations, and solicited comments concerning other elements of the transition plan.

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<sup>1</sup>Apple has participated actively in this proceeding. Apple filed comments directing the Commission's attention to elements of its proposed transition plan that would preclude the development of non-licensed PCS in a timely manner, and urged the Commission to implement procedures that would quickly clear microwave incumbents from the 2 GHz frequencies that would be devote to non-licensed PCS.

The Commission should hold in abeyance the transition rules that it adopted in the FCC Decision. It would be premature at this stage to adopt transition rules, because key elements of a transition plan have yet to be resolved. The Commission, for example, has not determined when the transition period will commence or how long it will last. FCC Decision, ¶ 27. The Commission also has not yet resolved whether it would be appropriate to dispense with a transition period for some services (*e.g.*, licensed PCS) , or whether a minimum time period for voluntary negotiations ought to be provided after the Commission issues a license to an emerging technology service provider. *Id.* ¶¶ 27-28.

Similarly, the Commission still is contemplating what the appropriate standards should be for determining whether relocated microwave licensees have received “comparable alternative facilities,” and has not decided what dispute resolution procedures should apply if disagreements arise between incumbent licensees and emerging technologies service providers. *Id.* ¶ 25.

Adopting transition rules at this stage also would violate the Administrative Procedure Act (“APA”). The APA requires that agencies conducting informal rulemaking proceedings make “publication or service of a substantive rule ... not less than thirty days before its effective date.” 5 U.S.C. § 553(d). Although the “effective date” for the rules adopted in the FCC Decision is upon us, material portions of the transition rules have not been published or served because they do not exist.

The APA also requires that agencies issues a “statement of ... basis and purpose” enabling a reviewing court “to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.” *Id.* § 553(c); Automotive Parts & Accessories Association v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968). It is self-evident that a reviewing court would not be able to determine why the Commission reacted to major issues of policy as it did when some of those issues have yet to be resolved.

For the foregoing reasons, the Commission should hold its transition rules in abeyance until the remaining transition issues have been resolved.

Respectfully submitted,

APPLE COMPUTER, INC.

A handwritten signature in black ink, appearing to read "H. Goldberg", is written over a horizontal line.

/s/ Henry Goldberg

Henry Goldberg

Joseph A. Godles

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November 30, 1992